No. 80-1224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TRANSAMERICAN PRESS, INC., and MIKE PARKHURST,
Petitioners,

v.

MURRAY W. (DUSTY) MILLER,
Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

Respondent would state the issues as follows:

1. Whether the trial court properly balanced the rights of respondents to a fair trial with the petitioners rights under the First Amendment in compelling the disclosure of confidential informants.

2. Whether the issue of California or other shield laws, if any, is ripe for decision.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported in 621 F(2) 721, and the opinion denying rehearing in 628 F (2) 932. The opinion of the district court is properly set out in appendix II of Petitioners' Application.

JURISDICTION

Properly stated by Petitioners, if their Application was on file on or before January 21, 1981.

STATUTE INVOLVED

28 U.S.C. §1291 (b). When a District Judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling

question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district court or the Court of Appeals or a judge thereof shall so order.

STATEMENT OF THE CASE

I. Nature of the Case

Respondent, M.W. Miller, a long time resident of Dallas, Texas and a temporary resident of Virginia when suit was filed, brought this action in Texas against Petitioners residents of California, and Transamerica Press of Texas, Inc., a Texas corporation for damages for libel. After numerous discovery efforts, it became apparent that alleged confidential informants of petitioner were the sole source of evidence bearing upon the defamatory printing. After denying three motions to discover the identity of the informant, and forcing additional discovery, the trial court granted the fourth motion. Then the trial court granted an interlocutory appeal from that order and the Fifth Circuit accepted such appeal under 28 U.S.C. §1292(b). The Fifth Circuit affirmed the order for discovery. Mandate is back in the trial court.

II. The Pertinent Facts

It early became apparent that Drinkhall, an officer and reporter of Transamerica Press who wrote the libelous statement of respondent, obtained the information upon which he relied from an alleged confidential source. Petitioners' attorney, by letter response to Respondent's attorney's (see TR p. 157/165)

question: "Are there alternative avenues whereby he [plaintiff] can ascertain the same information for which we [defendants] are asserting a privilege?" Answered: "There are none of which we are aware as of this time".

Petitioners, in answer to the second set of interrogatories propounded to them by Respondent (see TR p. 114/125) to question 2: "Please given the name and addresses of all witnesses on whom you expect to rely and to introduce their testimony at trial to prove the statement: 'Before he left, Dusty borrowed 1.6 million in 1956 from the fund to buy Trinity Sand and Gravel in Dallas.' " Answered: "As far as Defendants are aware, only confidential informants would testify as to the truth of said statement and these confidential informants will not be produced at trial." The Trial and Appeals Courts have now ordered the discovery of the confidential informants.

REASONS FOR DENYING THE WRIT

I. The Decision Rendered By The Fifth Circuit In This Case Is Not In Conflict With The Decision Of Another U.S. Court Of Appeals Or This Court And Is In Conformity With The Law Generally, And Balances The Rights Of Respondent To A Fair Trial With Petitioners' Rights Under The First Amendment.

The Court of Appeals pointed out that "Transamerican's only source for the alleged libelous comments is the informant. The only way that Miller can establish malice and prove his case is to show that Transamerican knew the story was false or that it was reckless to rely on the informant. In order to do that he must know the informant's identity."

Petitioners themselves set forth the history of cases from all circuits and fail to point to a single circuit in dispute with the Fifth Circuit's opinion, although some circuits would not force a plaintiff to go as far in discovery as was actually done here.

Petitioners want this Court to order a plaintiff to exhaust "(a) Justice Department files; (b) Internal Revenue Service files, and (c) interviews or depositions of various individuals" when by their own admission and the finding of the Fifth Circuit the "only source for the alleged libelous comments is the informant."

Petitioners have failed to point to a single First Amendment Interest not considered or wrongly considered in this case. Indeed, they want this court to grant them a license to print as they please and grant them immunity from libelous conduct. That flies in the face of every decision of this Court to date.

II. The Issues As To The Applicability Of The California Shield Law Or Shield Laws Of Other States, If Any, Were Not Presented To The Trial Court For Decision And Were Not Certified For Decision Under 28 U.S.C. §1292(b) Or The Order Of The Court Granting The Interlocutory Appeal, And Are Not Ripe For Decision.

The matter of the application of the so-called shield laws should await development of such issues in the trial court after motions and evidenciary hearing, and rulings by the trial court. Otherwise, Art. 28 U.S.C. §1292(b) has little meaning. If the California law should be applied by a Texas Court, the method of application and the Constitutional challenge to it can then be developed in an orderly manner. Indeed the issue may not even be reached! There may not be a confidential informant; if there is one or more they may decide to comply with the court's order; if they don't, the court may not judge them in contempt. A number of other solutions may be found. If contempt is ordered, it may violate the California Statute, or violate only an invalid or unconstitutional portion thereof.

CONCLUSION

Petitioners really seek advisory opinions on issues not yet ripe for decision and which may never be reached. No conflicts in decisions have been demonstrated, and the duty to protect confidential informants has been carefully, indeed preponderantly, balanced with respondents right to a fair trial. The petition should be denied. *American Construction Co.* v. *Jacksonville T & K.R. Co.,* 148 U.S. 372, 384, 13 S.Ct. 758(1893); *Supreme Court Practice,* by Stern & Gressman, 5 Ed. §4.19 p. 300ff.

Respectfully submitted,

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